

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

INCOME TAX REFERENCE NO. 179 OF 1988.

The Commissioner of Income-Tax.,
Bombay City-IV, Bombay.

... Applicant.

V/s.

Mahindra & Mahindra Ltd.
Gateway Bldg, Apollo Bunder,
Bombay- 400 039.

... Respondent.

Ashok Kotangale for the applicant.

S.E.Dastur, senior counsel with B.V.Jhaveri
for the respondent.

CORAM : V.C.DAGA AND A.S.AGUIAR, JJ.

DATED : 30th September 2005.

JUDGMENT : (Per V.C.Daga, J.)

. By this reference under section 256 of the
Income-tax Act, 1961 ("Act" for short), the Income
Tax Appellate Tribunal has referred the following
questions of law for the opinion of this Court:

1. Whether, on the facts and in the
circumstances of the case, the Tribunal
being the custodian of the I.T.Act, was
right in law in holding that the
provisions of I.T.Rules 87 and 88 and
the Board's notification issued in
exercise of the powers conferred

u/s.36(1)(iv) of the I.T.Act should be ignored as being conflict with the provisions of sec. 36(1)(iv)?

2. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in allowing as a deduction u/s.37 of the I.T.Act the entire initial contribution to the superannuation fund in respect of liability as on the last day of the accounting year in respect of the entire service of the employees of the company, who were for the first time admitted to the benefits of the superannuation fund, as representing the assessee's liability for the asstt. year 1977-78?

3. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the donation for Rs.1,25,777/- to an education society was allowable as an expenditure wholly and exclusively for the purpose of business?

4. Whether, on the facts and in the circumstances of the case, the expenditure of Rs.38,100/- towards supply of tea, soft drinks is entertainment expenditure u/s.37(2B) of the I.T.Act, 1961?
5. Whether, on the facts and in the circumstances of the case, the Tribunal was right in holding that the road constructed by the company constituted 'plant' within the meaning of sec.43(3) of the I.T.Act, 1961, and is eligible for depreciation allowance?
6. Whether on the facts and in the circumstances of the case, the interest u/s. 216 could be levied on the advance tax payable itself was not underestimated being the amount payable in instalments was a loss?
7. Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the

full liability on actuarial basis on account of special provision represented on accrued liability and was an admissible deduction in computing the profits of the assessee company for asstt. year 1977-78?

8. Whether, on the facts and in the circumstances of the case, the Tribunal was right in allowing legal expenses of Rs.8,000/- and foreign travel expenses of Rs.47,754/- in connection with the merger of the international Tractor Co. of India Ltd. as a revenue expenditure in computing the total income of the company for assessment year 1977-78?

Question Nos.1 and 2 :

2. Learned counsel for the parties agreed that so far as question Nos.1 and 2 are concerned, they are covered by the decision of this Court in the case of **C.I.T. v. Mahindra Sintered Products Ltd.**, (2001) 252 ITR 576 and **Mahindra & Mahindra Ltd. v. C.I.T.**, (2003) 261 ITR 501; wherein similar questions did arise and relying on the judgment of

the Apex Court in the case of **C.I.T. v. Sirpur Paper Mills**, (1999) 237 ITR 41; this Court has held that the notification issued by the CBDT cannot curtail the scope of deduction granted by the Act. In this view of the matter, question Nos.1 and 2 both have to be answered favour of Assessee and against the Revenue. Accordingly, question Nos.1 and 2 stand answered in affirmative i.e. in favour of assessee and against the revenue.

Question No.3 :

3. Learned counsel for the parties also agreed that this question is also covered by the judgment of this Court in the case of assessee itself reported in (2003) 261 ITR 501 (**Mahindra & Mahindra Ltd. v. C.I.T.**). Accordingly, question No.3 has to be answered in the affirmative i.e. in favour of the assessee and against the revenue. We answer the said question accordingly.

Question No.4 :

4. So far as question No.4 is concerned, the amount involved is only Rs.38,100/-. Learned counsel for the revenue, at whose instance the

question has been referred, does not press question considering the negligible amount involved. The said question is, thus, returned unanswered.

Question No.5 :

5. Learned counsel for the assessee fairly submitted that this Court in assessee's own case reported in (2003) 261 ITR 501 (**Mahindra & Mahindra Ltd. v. C.I.T.**) had occasion to answer the similar question; wherein this Court, relying upon the judgment of the Apex Court in the case of **C.I.T. v. Gwalior Rayon Silk Manufacturing Co.Ltd.**, (1992) 196 ITR 149, has held that the road constructed within the factory premises of the company is not a plant but is a building. In this view of the matter the question No.5 herein is answered in negative i.e. in favour of Revenue and against the Assessee.

Question No.6

6. So far as question No.6 is concerned, it pertains to interest under section 216 of the Act. The Income Tax Officer ("I.T.O." for short) had levied interest under section 216 without recording any finding that the assessee had underestimated its

income while filing estimate under section 212 of the Act. Appeal was filed before C.I.T.(A). The said appellate authority in its order observed as under:

"..... Sec.216 provides that interest under that section is chargeable only when the advance tax payable has been underestimated and the assessee has thereby reduced the amount payable in either of the two instalments. The Income Tax Officer has not given any finding that the appellant had deliberately underestimated its income as also the advance tax payable thereon in the first two instalments. No finding has been given by the Income-tax Officer to this effect. Since no finding about any default committed by the assessee in this regard has been given by the ITO, I would hold that the interest has not been correctly levied following the decision of the Andhra Pradesh High Court in the case of Additional CIT V. Vazir Sultan Tobacco Co. Ltd. (122 ITR 251). In the result the last ground of appeal is allowed."

It is not in dispute that I.T.O. did not record any finding that there was any wilful default on the part of the assessee. In second appeal from the order of C.I.T.(A), the tribunal was pleased to uphold the order of C.I.T.(A); whereunder levy of interest under section 216 was set aside.

7. Learned counsel appearing for the Revenue

tried to contend that the finding of the Tribunal is not in accordance with law. According to him, the

authorities below could not have relied upon the judgment of the Andhra Pradesh High Court in the case of **Addl.C.I.T. v. Vazir Sultan Tobacco Co.Ltd.**, (1980) 122 ITR 251 in view of the judgment of this Court in the case of **Oudh Sugar Mills Ltd. v. C.I.T.**, (1994) 210 ITR 692; wherein this Court did not accept the correctness of the judgment in the case of **Vazir Sultan** (supra). He submits that the judgment in the case of **Vazir Sultan** (supra) was also not approved by the Full Bench of the Andhra Pradesh High Court in the case of **C.I.T. v. Rayalaseema Mills Ltd.**, (1997) 228 ITR 477.

8. Per contra, Mr.Dastur, senior counsel appearing for the respondent - assessee submits that so far as the judgment of **Vazir Sultan** (supra) is concerned, the said judgment, to the extent it holds that section 216 requires that the I.T.O. must record a finding, at the time of regular assessment; that the assessee, under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) of section 211, has underestimated the advance tax payable by him and thereby reduced the amount payable in either of the first two instalments, still holds good. He submits that so far as necessity of recording of finding by the I.T.O. is

concerned, none of the High Courts have taken any view contrary to the view taken in the case of **Vazir Sultan** (supra) on this count. He submits that in the case on hand, no finding as required under section 216 has been recorded by the I.T.O. in the assessment order dated 5th September, 1980. Based on this he submits that no fault can be found with the finding recorded by the Tribunal in this behalf. Accordingly, he prayed that this question be answered in favour of the assessee.

9. In rejoinder, when Mr.Kotangale, learned counsel for the Revenue called upon to react to the above submission made by Mr.Dastur, he could not point out any adverse judgment of any Court nor could he demolish the submission advanced by Mr.Dastur.

10. Mere reading of section 216 of the Act brings out the necessity of recording a finding by the I.T.O. as canvassed by Mr.Dastur. In this view of the matter, no fault can be found with the view taken by the tribunal. Thus, question No.6 is answered in favour of the assessee and against the Revenue.

Question No.7

11. So far as question No.7 is concerned, the facts found by the Tribunal are as under:

On 20th September, 1975 the company issued notice terminating the services of certain officers effective from 1st January, 1976. In effect the services of 75 officers were terminated from this date which falls in the accounting year relevant to the assessment year 1977-78. The company had claimed that the actuarially quantified liability of Rs.30,57,740/- in respect of special pension should be allowed in the assessment year 1976-77. The I.T.O. disallowed this claim on the ground that the liability would have to be considered in the year in which retirement took place. In view of this decision, of the I.T.O. and having regard to the uncertainty regarding the outcome of appeal for that year, the appellant had staked the claim for the same amount in the year 1977-78 the year in which the retirement has taken place. During the year ended 31st October 1976, the company paid Rs.5,44,140/- which was the actual amount paid. Shri Khare submitted that when the accounts are maintained on a mercantile basis, and when the actuarial valuation of existing liability was produced before the ITO, such liability should have been allowed and the factum of actual payment was irrelevant....."

12. The tribunal relying upon the decision of the Calcutta High Court in the case of **C.I.T. v. National Insurance Co.,** (1981) 127 ITR 54 held that there was a definite liability to the pensioners which had already arisen as such assessee was entitled to claim deduction on this account.

13. The tribunal in the case on hand found that 75 officers had already retired on 1st January, 1976 whereas services of 8 more officers were terminated during the year ended 31st October, 1976. The tribunal, thus, found that the claim for deduction claimed on the basis of accrual of liability could not be rejected merely on the ground that the assessee did not pay the liability or deferred its payment during the year under reference. The tribunal having noticed mercantile method of accounting followed by the respondent-assessee under which, if a business liability has definitely arisen in the accounting year, a deduction could be claimed. The provision in the books of accounts in respect of special pension had been made on the basis of liability which was accrued and quantified actuarially. The tribunal was, thus, pleased to allow deductions of liabilities in respect of staff retired on 1st January, 1976 amounting to Rs.30,57,740/-, and in respect of 8 officers whose services were terminated during the accounting year, the liability of which was in the sum of Rs.8,52,913/-.

14. Learned counsel for the revenue submitted that the amount has not been actually paid and, therefore, the respondent-assessee was not entitled to claim deduction on actuarial basis unless the liability was actually discharged.

15. Per contra, Mr.Dastur tried to support the findings recorded by the tribunal. He reiterated the submissions which were made before the tribunal, reproduction of which is not necessary since the same are to be found in the order of the authorities below. Mr.Dastur relying upon the decision of the Calcutta High Court in **National Insurance Co.** (supra) submitted that since the persons, in respect of whom provision of pension was made, had already retired, there was an existing liability in terms of their employment as such existing liability was actuarially computed and the provision for the same was made as such the amount of deduction represented an accrued liability and was an admissible deduction in computing the profits of the assessee for the assessment year 1977-78.

16. Having heard rival parties, the submissions made by Mr.Dastur deserve acceptance. No fault can be found with the view taken by the tribunal. The

judgment in **National Insurance Co.** (supra) relied upon by Mr.Dastur is based on the earlier view of the Calcutta High Court in the case of **C.I.T. v. Easter Spinning Mills Ltd.**, (1980) 126 ITR 686, which in turn was based on the earlier judgments of the Apex Court amongst others in the case of **Indian Molasses Co. (P) Ltd. v. C.I.T.**, (1959) 37 ITR 66 and **Standard Mills Co.Ltd. v. C.W.T.** (1967) 63 ITR 470; wherein more or less similar issues were involved. The High Court ruled that a prudent businessman is always bound to make a fair estimate of his liability under the Act from year to year and is entitled to make provision for such liability. While considering the liability arising on account of payment of gratuity the High Court ruled that such liability is always in the form of deferred payment of wages of the employees concerned as such the said deduction can be allowed on the actuarial valuation. Respectfully agreeing with the above view, we do not find any fault with the view taken by the tribunal. We, in the result, answer question No.7 in the affirmative i.e. in favour of the assessee and against the revenue.

Question No.8

17. So far as question No.8 is concerned, it pertains to legal expenses incurred in the sum of Rs.8,000/- and on account of foreign travel in the sum of Rs.47,754/- in connection with the merger of assessee with International Tractor Co. of India Ltd. The expenses in question were held to be of revenue nature. The issue raised is squarely covered by the judgment of the Apex Court in the case of **C.I.T. v. Bombay Dyeing and Mfg. Co. Ltd.**, (1996) 219 ITR 521. In that view of the matter, the said question requires to be answered in favour of the assessee and against the Revenue and stands answered accordingly.

18. Reference stands disposed of in terms of the above order with no order as to costs.

(A.S.AGUIAR, J.)

(V.C.DAGA, J.)